IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Marriage of:	)	
	)	
HELEN MCLOUGHLIN,	)	Nos. 55886-2-I & 56731-4-I
	)	
Respondent,	)	DIVISION ONE
	)	
and	)	
	)	
CHARLES BUELL,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: July 31, 2006
	)	

AGID, J. -- Charles Buell challenges two child support orders entered February 11, 2005 and July 28, 2005 on numerous grounds. He asserts the trial court erred in the February 11, 2005 order by denying his request to prorate his child support obligation for the month his daughter turned 18 and by finding that he (1) owed $75 per month as additional support, (2) would not be reimbursed for prior health insurance premiums, (3) owed his proportional share of his daughter's private postsecondary educational expenses, and (4) failed to prove he was unable to work in 2004 at the same level of income as 2003. He also argues the trial court erred in the July 28, 2005 order by imputing income to him in 2004 based on his 2003 income and because he presented evidence from his

chiropractor rather than his doctor.

The Parenting Act, chapter 26.09 RCW, does not require a parent to maintain the same level of income each year. The trial court erred by imputing income to Buell without finding that he was voluntarily underemployed for the purpose of avoiding child support. We remand to the trial court to determine Buell's income for 2004. We affirm all the other orders.

FACTS

Charles Buell and Helen "Patsy" McLoughlin have three children from their former marriage. LB1 is emancipated; LB2 has just entered college; and EB is 16 years old. Buell is a self-employed contractor, consultant, and inspector in the construction industry. McLoughlin is a self-employed massage therapist.

1995 Original Order of Child Support

When Buell and McLoughlin divorced, the child support order provided that Buell's monthly gross income was $3,177, his monthly net support was $770, and his proportional share was 67.7 percent. McLoughlin's monthly gross income was $900, her monthly net support obligation was $200.68, and her proportional share was 32.3 percent.[1] The order included the following relevant terms:

3.4 TRANSFER PAYMENT.

[X] The obligor parent shall pay $770.00 per month (inclusive of

[1] Both parents maintained an environment for their children, who lived with each parent equally in the summer.

childcare obligation for . . . children [who] are with the mother and in childcare) plus the cost of healthcare insurance for the children, and shall pay for children when the children are scheduled to be with him. Mother shall pay [for] children when children are scheduled to be with her.

. . . .

3.12 TERMINATION OF SUPPORT.

Support shall be paid:

[X] . . . until the children reach the age of 18 or until completion of high school, whichever occurs last, but not past age 19 for [EB] or [LB2] or past age 20 for [LB1]. Except as otherwise provided below in Paragraph 3.13. Support may be earlier terminated by marriage of the child or emancipation.

3.13 POST-SECONDARY EDUCATIONAL SUPPORT.

[X] The Court reserves jurisdiction to provide post-secondary support for the children. *The right to petition for post-secondary support is reserved, provided that the right is exercised before support terminates as set forth in paragraph 3.12.*

. . . .

3.17 MEDICAL INSURANCE.

3.17.1 Health insurance coverage for the children as listed in Paragraph 3.1 shall be provided by both parents if coverage that can be extended to cover the children is or becomes available through employment or is union related and the cost of such coverage does not exceed twenty-five percent of the parent's basic support obligation.

A. The mother presently has no coverage available to her as she is self employed. In the future if she is employed and health insurance is available to her as stated above, she shall obtain said coverage for the children.

B. *The father presently has been paying $145 per month for coverage of the three children.* The $145 exceeds 25% of his basic support obligation but he is willing to continue said coverage and shall continue such coverage. *If the mother can qualify for basic coverage for the children and private coverage by the father is not*

needed, he shall pay $75 to the mother in additional support.[2]

In December 1995, McLoughlin informed Buell that she had obtained health insurance for the children. Buell removed the children from his policy and began paying $75 per month in addition to his basic support. In 1998, he demanded proof from McLoughlin that she was paying health insurance premiums for the children rather than relying on Medicaid Basic Health Plus, which provided coverage for the children at no cost. Shortly after making this demand, he stopped paying the additional $75 per month. On June 5, 2002, McLoughlin demanded that Buell pay postsecondary educational support for their eldest child, LB2, and resume paying his $75 monthly obligation in accordance with the terms of the 1995 decree.

On July 1, 2004, McLoughlin moved to modify the original support order. She requested a modification based on (1) a change in the children's age category, (2) the parties changed income, (3) educational and extracurricular expenses, (4) health insurance coverage in the event that the children would no longer be covered by Basic Health Plus, (5) postsecondary educational support for LB2, (6) an extension of child support beyond the children's 18th birthday, (7) long distance transportation for LB2 while she attended college, (8) $5,475 for non-payment of the $75 per month additional support dating back to 1998, (9) past due support for LB2, and (10) one-half of LB1 and EB's educational and extracurricular expenses.

On July 21, 2004, Buell filed a motion for modification based on his

[2] (Emphasis added.)

changed financial circumstances and requested (1) reimbursement for overpayment of health insurance premiums, (2) overpayment of child support as of June 1, 2004, (3) legal fees, and (4) sanctions. He submitted a declaration and documentation to show that his 2004 net monthly income was $1,518.81 after deductions of business expenses. He did agree that the children would benefit from modest postsecondary education support commensurate with the parents' financial circumstances.

On October 8, 2004, Buell submitted a declaration to the court describing his shoulder pain and restricted use of his right arm to justify the reduced income. His evidence included an initial examination report by Dr. Morris from the Virginia Mason Medical Center describing his shoulder pain as chronic and assessing his condition as consistent with chronic impingement syndrome. The report stated that Buell had given up rock climbing, but it did not contain a medical opinion about Buell's work limitations.

October 27, 2004 Order

On October 27, 2004, the court denied Buell's motion for reimbursement and both parties' motions for attorney fees on the ground that there was intransigence on both sides. The court entered the following findings and conclusions:

> 2. In the original order of Child Support, ¶3.17 has 2 unusual clauses. The father is required to pay $145/month for health insurance coverage even though it exceeds 25% and if the mother can qualify for Basic coverage the father will pay $75/mo as additional support. ¶3.17.1(C) proves that the $75/mo provision can be reviewed at the time of each annual adjustment to see if cost effective.
>
> 3. The father paid the $75/mo for a period of years because the

mother obtained Basic Health for the children.

4. Negotiations and letters were sent each year and the new child support amount was compromised on.

Conclusions of Law

1. The court order can be construed if there is any ambiguity. There was no ambiguity in the Order of Child Support.

2. The issue is the intent of the Court entering the order not the intent of the parties.

3. The Washington State Child Support schedule provides for a minimum amount of child support. It is hoped and intended that parents will contribute over and above the transfer payment amount.

RCW 26.19.080(4) provides for the Court to exercise jurisdiction when support is paid in excess of the basic support amount. The additional $75 was for support beyond what was required.

4. The Court exercised its discretion in ordering the father to pay additional support when the mother provides health insurance.

5. The $75 paid by the father was extra support presumably out of love for his 3 children.

6. The other sections of RCW 26.19.080 do not apply[,] particularly the section regarding reimbursement of child care and special child rearing expenses . . .

7. There are no equities to be reviewed because ¶3.17.1(C) provides that the provision regarding the additional support was reviewable annually. The door was open to each party as a matter of law to review this provision.

November 18, 2004 Order On Modification of Child Support

After a trial by affidavit, the Commissioner found (1) Buell presented no proof that the pain in his shoulder limited his ability to work, (2) modification for postsecondary education should occur before the end of the child support period, (3) both parents must pay their proportionate shares for postsecondary support, health insurance, uninsured care costs, (4) McLoughlin was to provide health insurance for EB and LB2, (5) the parents were to split the cost of two trips per school year for LB2 to travel between college and home, and (6) support for LB2 and EB should be paid from June 1 through July 31, 2003. The

court ordered the parents to pay their proportional shares of auto insurance and other expenses agreed upon by the parents and held there was no basis to modify the annual adjustment provision agreed to by the parties. The court ordered each party to pay his or her own attorney fees and costs because each party had the ability to pay.

February 11, 2005 Child Support Order

Buell filed motions for revision and modification of both the October 27 and November 18 orders. On February 11, the superior court judge changed the calculation for EB's support and affirmed the rest of the commissioners' rulings. It adopted the following findings of fact and conclusions of law:

> 1. The $75/month was additional support pursuant to the Order of Support entered on May 17, 1995, if the father didn't have to pay for health insurance.
> 2. It is manifestly unfair for the father to wait for all these years to seek reimbursement for that expense even if he might have been entitled to reimbursement if he had brought a motion in one of the annual adjustments prior to 2000.
> 3. Laches and equitable estoppel apply to preclude father's motion for reimbursement.
> . . . .
> 5. The parties' daughter is an exceptional student with many interests and talents. She also achieved an amazing feat by obtaining all but $4,000 of the $43,000 it costs to attend Brown University.
> 6. The father should not be able to use his daughter's diligence against her to avoid paying his fair share of her college expenses.
> 7. The parties shall pay their proportional shares of their daughter's college expenses as ordered by Commissioner Canada-Thurston.
> 8. Regarding the issue of Mr. Buell's income and disability, the medical record supplied by Mr. Buell is based on his subjective report to the Virginia Mason Sports Medicine Clinic. There is nothing in the report or any other information provided by Mr. Buell that establishes objectively that he was or is unable to work at the level he earned in 2003.
> 9. Based on a de novo review of the evidence, it is appropriate to use the 2003 income of the parties to establish the level of support and

each party's proportional share.

10. There is no authority for prorating the support owed in July and it shall not be prorated.

Based on these findings, a revised order of support was entered to reflect the change in support for EB.

July 28, 2005 Order Adjusting Child Support

Buell then moved for an adjustment of child support to reflect McLoughlin's increased income and his decreased income based on his disability, and other relief. McLoughlin agreed that support should be adjusted to reflect her increased income but argued that Buell was voluntarily underemployed to avoid paying child support. She asserted Buell's income calculation should be based on his 2003 tax return ($3,331), rather than the net monthly income of $1,518, because Buell failed to prove his claim of disability or that he was prevented from working at his previous capacity.

The court ruled it was bound by the judge's February 11, 2005 findings, and Buell was required to bring evidence from his doctor, rather than his chiropractor, to prove he was not voluntarily underemployed. The court imputed income to Buell and set his monthly income at $2,888. The court denied the requests for legal fees.

These linked appeals arise from Buell's separate appeals of the February 11 and July 28, 2005 orders.

DISCUSSION

The superior court has broad discretion to modify child support provisions.[3] The superior court's review is not limited to whether substantial evidence supports the commissioner's findings, but it is "authorized to determine its own facts based on the record before the commissioner."[4] An appellate court

[3] In re Marriage of Goodell, 130 Wn. App. 381, 388, 122 P.3d 929 (2005) (citing In re Marriage of Dodd, 120 Wn. App. 638, 644, 86 P.3d 801 (2004)).

reviews orders modifying child support for abuse of discretions.[5] Findings of fact must be supported by substantial evidence and those findings must support the court's legal conclusions.[6]

Postsecondary Educational Support

On February 11, 2005, the superior court ordered the parties to pay their proportional share of LB2's college expenses. Buell asserts the court erred by failing to consider his age, limited means, and duty to support his youngest child. He also asserts the court erred by failing to make a finding about the suitability of the education available to LB2. He contends the court abused its discretion when it ordered him to pay his proportional share of $4,000 for his daughter's tuition and expenses at Brown University because the University of Washington was an appropriate, cost-free alternative for LB2. He also argues the court erred when it ordered postsecondary educational support for EB because McLoughlin failed to present evidence that college was appropriate for EB.

McLoughlin argues the court did not err by ordering Buell to pay his proportional share of LB2's postsecondary education. She also asserts that Buell's argument about EB is unfounded because the court did not order postsecondary support for EB. We agree.

RCW 26.19.090(2) permits a trial court to exercise its discretion when ordering support for postsecondary education and outlines the factors the court

[4] Dodd, 120 Wn. App. at 644.
[5] In re Marriage of Mattson, 95 Wn. App. 592, 599, 976 P.2d 157 (1999).
[6] Id. (citing In re Marriage of Leslie, 90 Wn. App. 796, 802-03, 954 P.2d 330 (1998), review denied, 137 Wn.2d 1003 (1999)).

should consider when making such an award.[7] When ordering postsecondary support, the court must first determine whether the child in need of support is in fact dependent and "relying upon the parents for the reasonable necessities of life."[8] When a postsecondary education support obligation would force the obligor parent into bankruptcy or require selling the family home, a postsecondary education order may be an abuse of discretion.[9] The court may require a parent to pay for a private college education,[10] and it need not set a limit on the obligor parent's responsibility for paying his or her share of postsecondary educational support.[11] If the court does impose a limit, it may cap education costs at the level necessary to pay for an in-state student to attend a state university.[12]

Buell relies on In re Marriage of Shellenberger to argue that the trial court erred by ordering him to pay for a private education without making specific findings.[13] In Shellenberger, the court concluded that the trial court must make specific findings before ordering a parent to pay for a "more expensive private college education."[14] But Shellenberger is distinguishable because unlike Buell,

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[7] In re Marriage of Kelly, 85 Wn. App. 785, 934 P.2d 1218, review denied, 133 Wn.2d 1014 (1997).

[8] RCW 26.19.090(2); In re Marriage of Shellenberger, 80 Wn. App. 71, 84, 906 P.2d 968 (1995) (This evaluation must include an assessment of the need to service preexisting debt reasonably incurred, pay reasonable monthly living expenses, support obligations for any other minor children, as well as an adult child's ability to contribute to her own education through scholarships or employment, and the obligee parent's ability to contribute to these expenses.).

[9] Shellenberger, 80 Wn. App. at 84.

[10] Id. at 84-86.

[11] Kelly, 85 Wn. App. at 791-94.

[12] See Shellenberger, 80 Wn. App. at 86-87.

[13] 80 Wn. App. 71, 84-86, 906 P.2d 968 (1995).

[14] Id. at 85.

Mr. Shellenberger could not pay for private school because of his disability. Further, in Shellenberger, the tuition difference between the University of Washington, a public university, and Seattle University, a private university, was considerable. Here, there is very little difference in cost to Buell. Brown University awarded LB2 scholarships that covered all but $4,000 of her $43,000 annual tuition and expenses. Most importantly, Buell provided no proof that LB2 had or would have gotten a scholarship covering all her expenses if she attended the University of Washington.[15]

Accordingly, the trial court did not abuse its discretion because the cost of LB2's tuition, $4,000 per year including all expenses, was not unreasonable. Despite Buell's claim to the contrary, the trial court capped his obligation "at the cost of a student attending the University of Washington, including room and board, [to be determined] from the University of Washington web site."

Buell's argument about postsecondary educational expenses for EB is without merit. The court did not order support for EB.

Order to Pay Proportional Expenses for Auto Insurance and Other Agreed Upon Activities

Expenses such as extraordinary health care, tuition, and long distance transportation costs are added to the basic support obligation and are shared by the parents in the same proportion as their share of combined family income.[16]

Buell argues that the court abused its discretion by ordering him to pay

[15] Mr. Buell's declaration was insufficient because it contained no documentation from the University.

[16] RCW 26.19.080.

his proportional share of EB's automobile insurance. Again, this argument is without merit. The February 11, 2004 order clearly states that the parents will pay their proportional share of EB's automobile liability insurance and other activities agreed upon by the parties. The trial court did not abuse its discretion because its order merely required Buell to pay his proportionate share of expenses he had already agreed to pay.

Payment of Final Month of LB2's Child Support

On February 11, 2005, the court ordered Buell to pay back child support for LB2 for the period June 1, 2004 through July 31, 2004. The 1995 decree provided that support for LB2 would end when she reached the age of 18 or completed high school, whichever occurred last, but in no event after she turned 19. Buell asserts the court erred by requiring him to pay child support through July 31, 2004 for LB2, rather than prorating this payment, because LB2 turned 18 on July 2, 2004. McLoughlin argues that the court correctly ordered Buell to pay the entire month of support because RCW 26.19.011 defines basic child support as a monthly child support obligation. She is correct.

RCW 26.09.170 permits termination of support when a child is emancipated unless the parties agree in writing or the decree expressly provides otherwise.[17] While LB2 was emancipated on July 2, 2004, there is no legal authority to support Buell's argument that he was entitled to prorate LB2's support for the 29 days that remained in July after her birthday.[18] Accordingly,

[17] RCW 26.09.170(3).

[18] State v. Young, 89 Wn.2d 613, 625, 574 P.2d 1171, cert. denied, 439 U.S. 870 (1978) (courts may assume that where no authority is cited, counsel has found

the trial court did not abuse its discretion when it ordered Buell to pay for LB2's support through the end of the month of July.

Reimbursement for Health Insurance Premiums

Buell asserts the trial court erred by ordering him to pay $75 per month as provided in the 1995 support order after McLoughlin got health insurance for the children. He argues this additional amount was intended as an offset for McLoughlin's health insurance payments and he is entitled to reimbursement for this amount under RCW 26.19.080(3) because she insured the children under a subsidized Medicaid program, Basic Health Plus. He also asserts the court erred by holding that equitable estoppel and laches precluded his claim because he asserted it within the 10 year statute of limitations.[19]

McLoughlin argues that the payment was intended as an increased amount of support under the language of the 1995 decree because Buell enjoyed a credit of $145 against his monthly payment once she got insurance for their children. She also argues Buell's unfair delay in raising this claim prejudiced her from 1998 to 2004, and that laches applies because there was no reason for him to wait so long to bring a motion to modify his support obligation. We need not reach the equitable arguments because the 1995 decree clearly required the $75 payment as additional support, and Buell never moved to modify that provision of the decree.

Insurance premiums are special child care costs under RCW

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none.).

[19] RCW 4.16.020(3).

26.19.080(3), which allow reimbursement for these expenses if the amount of the overpayment amounts to at least 20 percent of the obligor's special child rearing expenses. RCW 26.19.080(4) allows the court to exercise its discretion when determining the "necessity for and the reasonableness of all amounts ordered in excess of the basic child support obligation." The doctrine of laches bars a cause of action when the defendant establishes that the plaintiff had a reasonable opportunity to discover the facts constituting a cause of action, the plaintiff delayed in bringing the cause of action, and the defendant was materially prejudiced by the delay.[20] Equitable estoppel applies when a party's actions cause another to detrimentally change their position or refrain from performing a necessary act.[21]

Buell's health insurance premium obligation ended when McLoughlin informed him she had obtained health insurance for their children.[22] By its plain language, the 1995 decree ordered Buell to "pay $75 to the mother as additional support" if McLoughlin qualified for basic coverage for the children and private coverage by the father was not necessary. And in its February 11, 2005 order, the court again found that this additional amount was support which was ordered "if the father didn't have to pay for health insurance."

The trial court properly ruled that the additional $75 per month was additional support under the terms of the 1995 decree. The 1995 decree clearly

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[20] Davidson v. State, 116 Wn.2d 13, 25, 802 P.2d 1374 (1991).

[21] Hartman v. Smith, 100 Wn.2d 766, 769, 674 P.2d 176 (1984) (quoting Dickson v. United States Fid. & Guar. Co., 77 Wn.2d 785, 788, 466 P.2d 515 (1970)).

[22] The November 18, 2004 order stated that McLoughlin would continue to provide health insurance.

stated that Buell would pay $75 as additional support, and Buell could have sought to modify his child support obligation during the annual review. His failure to do so precludes any retroactive relief.

Imputed Income

Buell argues that his child support obligation should not be based on his most recent annual income tax return, but on a lesser amount because his shoulder injury prevents him from earning an income at the same level. He asserts that the court erred by imputing income to him in the July 28, 2005 order without finding that he was voluntarily underemployed for the purpose of avoiding his child support obligation.

A parent may not avoid a child support obligation by remaining voluntarily unemployed or underemployed.[23] If a parent does so, a court may impute income to him or her.[24] A parent is voluntarily unemployed when that parent's unemployment is brought about by one's own free choice and is intentional rather than accidental.[25] Income may not be imputed to a parent who is working full-time unless the court finds the parent is voluntarily underemployed for the purpose of reducing the support obligation.[26]

Here, the trial court did not find either that Buell was voluntarily underemployed or that he sought to avoid his support obligation. At the time of the July 28 order, Buell was working full time, but the nature of his work had changed from heavy construction to inspections and consulting. Buell is a 59-year-old man whose chiropractor stated that he could no longer do heavy construction, so the change in career and in his income is not surprising. Under

[23] RCW 26.19.071(6).
[24] RCW 26.19.071(6).
[25] In re Marriage of Pollard, 99 Wn. App. 48, 54, 991 P.2d 1201 (2000).
[26] RCW 26.19.071(6).

the Parenting Act, a parent may work full-time for less money and is not required to maintain the same level of income from year to year. Nor is a parent required to prove he or she is disabled unless the court finds voluntary underemployment. Because that finding is absent, the trial court could not impute income to Buell. We remand to the trial court to determine Buell's income for 2004.

Legal Fees

The court denied attorney fees to the parties in both the February 11 and July 28 orders. Buell argues the court erred because it failed to make specific findings about his financial need and McLoughlin's intransigence. An appellate court reviews a trial court's decision on attorney fees for an abuse of discretion.[27] The party challenging the decision must demonstrate the trial court exercised its discretion in a manifestly unreasonable manner.[28] The court may award attorney fees in modification actions based upon need and ability to pay.[29]

The parties have brought multiple motions over the course of two years. In all of the hearings below, the lower courts consistently found that they had the ability to pay their own fees and expenses.[30] We will not disturb the lower court's findings that both parties were intransigent and have the ability to pay their respective attorney fees because those findings are supported by the

[27] In re Marriage of Burke, 96 Wn. App. 474, 476, 980 P.2d 265 (1999).
[28] In re Marriage of Crostetto, 82 Wn. App. 545, 563, 918 P.2d 954 (1996).
[29] RCW 26.09.140.
[30] On October 27, 2004, the Commissioner found that there was intransigence on both sides and ordered each party to pay their respective attorney fees. So, too, on November 18, 2004, the court did not order fees and costs because each party had the ability to pay his or her own attorney fees. In its February 11, 2005 order, the court affirmed the October 27 and November 18 orders. And in its modification order on July 28, 2005, the court affirmed the February 11 order.

record.

Both parties also request attorney fees on appeal. Buell does not support his request with any legal authority.[31] McLoughlin argues that she should be awarded fees because this proceeding is an extension of the trial litigation in which Buell has been intransigent. But the trial court has determined that both parties have been intransigent and can pay their own fees. We see no reason to vary from these findings and decline to award attorney fees or costs to either party.

We remand for the entry of findings on the issue of Buell's 2004 income and affirm in all other respects.

Ajid, J.

WE CONCUR:

Appelwick, C.J.

Coleman, J.

[31] See State v. Johnson, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992) (We will not review an issue unsupported by authority or persuasive argument.).